No. 75-790

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

WILLIAM NEAL McCULLOUGH,
Petitioner,
v.
STATE OF WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI ADDRESSED TO THE SUPREME COURT OF THE UNITED STATES

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INDEX

Table of Cases

Constitutional Provisions

Statutes

Rules of Court

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

JURISDICTIONAL STATEMENT

The Washington State Court of Appeals, Division III, in cause No. 1227-III, filed its opinion on June 17, 1975, affirming the trial court's Judgment and Sentence dated the 28th day of June, 1974. A copy of said opinion appears in the Appendix of this petition.

Petition for Rehearing was properly and duly filed, and the Order Denying Petition for Rehearing was filed on the 8th day of August, 1975, by the Chief Judge of the Court of Appeals, Division III.

Petition for Review directed to the Supreme Court of the State of Washington was duly and properly filed and review was denied on the 7th day of October, 1975,

with judgment becoming final on the 7th day of October, 1975, at which time it was remitted to the Superior Court of Grant County, Washington, after having become the final judgment of the Court of Appeals in the above-entitled case on October 7, 1975.

The jurisdiction of this Court to entertain the petition for certiorari is based upon Title 28 U.S.C. Section 1257.

QUESTIONS PRESENTED FOR REVIEW

The petitioner, William Neal McCullough, was charged by Information in the Superior Court of Grant County, Washington, with the crime of manslaughter to which he entered a plea of "not guilty".

Trial to a jury was held and following presentation of evidence by the State of Washington, the defense submitted its evidence. As part of that evidence, the petitioner took the stand and testified. During direct examination, no testimony was elicited concerning any prior convictions. However, on cross-examination by the Prosecuting Attorney of Grant County, the petitioner was asked if he had ever been convicted of another crime.

Timely objection was made to the prosecutor's question — the defense contending that the question was improper unless the prosecution was prepared to establish by independent evidence other than the testimony of the defendant, that (1) the defendant had been convicted of a prior crime, and (2) that he had been represented by counsel at the time of the previous conviction.

The jury was removed from the courtroom while arguments were heard concerning the objection. During these arguments (St. 100 through 104), it became

apparent that the prosecution was unable to produce any independent evidence of any nature regarding any prior conviction, or that the defendant had an attorney at the time of the alleged previous conviction, or that he had knowingly waived his right to counsel. The prosecutor stated that "... they called over to Adams County and there was a trial on 24 November 1971" (St. 102, line 26). The defense drew to the Court's attention that phone calls did not constitute evidence and the Court agreed. The Court then suggested that the State attempt to bring a Court Reporter from Adams County, Washington, to Grant County to testify. This suggestion was not able to be followed since Adams County had no offlcial and regular Court Reporter in its employ.

The prosecutor then asked the defendant if he had been represented by counsel, and the defendant responded that he had and that he then wished to speak to his present trial counsel, who informed the Court that the defendant was uncertain as to whether the former Adams County matter involved a misdemeanor or a felony. A discussion then followed as to what kind of crime it may have been and the identity of petitioner's former attorney. At the end of the discussion, petitioner's counsel moved for a mistrial because the prosecution had been unable to shoulder its required burden of proof at the time that the question had been asked the defendant in the presence of the jury (St. 104). The trial court denied the motion, permitted the prosecution to ask the question, and the defendant answered that he had been convicted of the crime of indecent liverties (St. 104).

Following the defendant's conviction, a motion for new trial was timely made which substantially involved the same issues. The trial court denied the motion for new trial, and following judgment and sentence upon

the verdict, the petitioner appealed to the Court of Appeals, Division III. The decision of the trial court was affirmed and the petition for rehearing denied by the Court of Appeals, Division III. A petition for review of the decision of the Court of Appeals, Division III, was timely made to the Supreme Court of the State of Washington, which petition was denied without appearance or argument.

QUESTION I:

Until a comparatively recent time, the acknowledged rule in Washington State permitted the prosecution to inquire of the accused concerning prior convictions. The rule was broad in its application, and questions could be asked for a number of reasons primarily for the purpose of affecting the weight of the witness's testimony. Of recent years, the rule has been modified in both civil and criminal cases to a large degree. In criminal cases the rule has been substantially affected by a number of decisions emanating from the United States Supreme Court. *State v. Kimbriel*, 8 Wn. App. 859, 510 P. 2d 255, stated the changing rule as follows:

> "(1) . . . It has long been the rule in this state that examination of a defendant with regard to prior convictions is error when the prosecutor is either unwilling or unable to prove the alleged conviction upon the witness' denial. . .
> "(2) Furthermore, a defendant's prior arrest record or other prior acts of misconduct, criminal or otherwise, are not admissible as bearing on the issue of credibility. . ."

The Washington Court of Appeals, Division III, following the *Loper v. Beto*, 405 U.S. 473, 31 L Ed. 2d 374, 92 S. Ct. 1014, decision, stated as the rule in Washington:

> "Hence, the rule now is that the use of prior convictions for the purpose of impeachment or enhancement of punishment shall not be allowed unless it appear upon the record that the defendant was afforded counsel at the prior hearing or, in fact made a valid waiver of counsel." *State v. Paul*, 8 Wn. App. 666, 508 P. 2d 1033.

In that case conceding that the decisions in *United States v. Tucker*, 404 U.S. 443, 30 L. Ed. 2d 592, 92 S. Ct. 389, and *Loper v. Beto, supra*, had not been made at the time of defendant Paul's trial, the court justified the inquiry of the prosecution upon cross-examination upon the basis that the defendant himself had testified concerning his prior convictions during direct examination and thus the State was permitted to pursue this line of questioning upon cross-examination without violating the constitutional rights of the defendant in light of those decisions.

At the trial of the instant cause, the prosecution, in attempting to justify asking the question concerning a prior conviction, contended that the defendant could deny the previous conviction, and the State could then later try him for perjury (St. 101, lines 27 through 29). The petitioner contends that this is an improper application of the rule growing out of the United States Supreme Court cases previously cited and the Washington court decisions.

The petitioner contends that the court committed reversible error in permitting the prosecutor to inquire regarding prior convictions, when it became apparent to the trial court that the prosecutor was unprepared and unable in the event of a denial to prove the fact of former conviction and that the petitioner had either had counsel or properly waived counsel on that occasion. Further, the trial court should have granted the

defendant's motion for mistrial because the question had been asked in the presence of the jury with timely objection having been made. Under the circumstances, any former conviction and/or whether petitioner had or had not counsel, or whether he properly waived counsel was not before the trier of fact by proper inquiry, and thus, the defendant was deprived of his right of due process under Amendment XIV of the United States Constitution and its application of the constitutional right of counsel under the Sixth Amendment to the states under the rulings in United States Supreme Court decisions in *Loper v. Beto, supra; Burgett v. Texas, supra; Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792, and other related cases of that court previously or hereinafter cited in this petition.

QUESTION II:

The petitioner further contends that he was denied due process of law under both the United States Constitution and the Constitution of the State of Washington in that under the existing constitution, statutes and decisions of the Supreme Court of the State of Washington, the petitioner was entitled as a matter of right to an appeal to the Washington State Supreme Court and that right was denied him. Art. 1, § 12, Washington State Constitution; Amendment XIV, § 1, United States Constitution.

Until November, 1968, since the adoption in 1889 of the Constitution of the State of Washington, appeal was considered a matter of right under Article 4, § 4, of the Washington State Constitution. *Bishop v. Illman*, 9 Wn. 2d 360, 115 P. 2d 151; *Robison v. LaForge*, 170 Wn. 678, 17 P. 2d 843.

Thereafter and until the passage of Amendment 50, Article 4, § 30, of the Washington State Constitution, this recognized right of appeal was exercised

through direct appeal from the Superior Courts to the Supreme Court of the State which was specifically granted appellate jurisdiction ". . . in all actions and proceedings . . ." with the exception of certain minor civil actions. Art. 4, § 4, Washington State Constitution; RCW 2.04.010.

Following the passage of Amendment 50, the legislature of the State of Washington enacted RCW Chapter 2.06, which, among other things, established a Court of Appeals (RCW 2.06.010), established divisions and various components thereof (RCW 2.06.020) and attempted to establish the power, authority and appellate jurisdiction of the court with the passage of RCW 2.06.030.

The latter statute is an attempted usurpation of the appellate jurisdiction granted by the Washington State Constitution to the State Supreme Court because the statute pretends to vest ". . . exclusive appellate jurisdiction. . ." in the Court of Appeals and to deprive the petitioner and others similarly situated from a valuable constitutional right under the Washington State Constitution. Petitioner argues that Amendment 50 (Art. 4, § 30) has not granted the legislature of the State of Washington the power to deprive parties on appeal of their right to appeal to the Supreme Court of the State, but has only provided for the establishment of a Court of Appeals with the legislature being provided the power to permit that court appellate jurisdiction and to establish the manner or mode in which the jurisdiction may be exercised without infringing on an appealing party's right to an appeal to the Supreme Court.

Petitioner further contends that ancillary to the right of appeal to the Supreme Court of the State, the State Constitution provides in Article 4, § 21, that all opinions of that court will be published. The legislature

of the State of Washington by the passage of RCW 2.06.040 has attempted to grant to the Court of Appeals of the State of Washington the power to determine which decisions of that court shall be published and which shall not, based upon the arbitrary and unreasonable standard of which cases the court shall deem to have or have not "precedential value." Decisions deemed not to have "precedential value" remain not only unpublished but do not become a part of the body of the common law of the State and are not to be considered if cited to any trial or appellate court. *State v. Fitzpatrick*, 5 Wn. App. 661, 491 P. 2d 262. Petitioner contends that the interaction of RCW 2.06.030 and RCW 2.06.040 have worked to deny the petitioner and many others similarly situated due process under Article 1, § 3, of the Washington State Constitution and the United States Constitution, Amendment XIV, § 1, and to deny petitioner and others the equal protection of the laws of the State of Washington found in the United States Constitution, Amendment XIV, § 1, and Article 1, § 12, of the Washington State Constitution.

Under the existing procedures for appeal in the State of Washington, there is no method or manner by which this question may be raised before either the Court of Appeals or the Washington State Supreme court. Following a decision by the Court of Appeals and a denial by that court of a petition for rehearing, the method to reach the Supreme Court is by a required petition for review CAROA 50 (b) (1). As perceived by the petitioner, applicants have no right to raise the constitutional question herein raised until after receiving a denial of the petition for review. Any opportunity to raise the issue is thence frustrated because there exists no procedure under the rules of the Washington State Supreme Court which permits a motion for re-

hearing or motion for reconsideration to be raised before that court upon a denial of the petition. Thus, there is no logical or recognized way known to petitioner to raise this issue unless certiorari is taken to the United States Supreme Court, and the only relief may only come from this court.

The petitioner and many others similarly situated have been wrongfully deprived of their valuable constitutional rights under the constitutions of both the State of Washington and the United States and many others shall have their rights so affected. The resulting and far reaching effects require that the questions presented by this petition be examined by the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT

I. Constitutional Provisions

Constitution of the United States, Amendment VI:

"Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Constitution of the United States, Amendment XIV:

"§ 1. Citizenship rights not to be abridged by states Section 1. All persons born or naturalized in the

United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the State of Washington, Article 1:

"§ 3. Personal Rights. No person shall be deprived of life, liberty, or property, without due process of law."

Constitution of the State of Washington, Article 1:

"§ 12. Special Privileges and Immunities Prohibited. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

Constitution of the State of Washington, Article 4:

"§ 1. Judicial Power, Where Vested. The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide."

Constitution of the State of Washington, Article 4:

"§ 4. Jurisdiction. The supreme court shall have original jurisdiction in habeas corpus and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in

controversy, or the value of the property does not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before any superior court of the state of any judge thereof."

Constitution of the State of Washington, Article 4:

"§ 21. Publication of Opinions. The legislature shall provide for the speedy publication of opinions of the supreme court, and all opinions shall be free for publication by any person."

Constitution of the State of Washington, Amendment 50, Article 4, § 30. Court of Appeals:

"(1) Authorization. In addition to the courts authorized in section 1 of this article, judicial power is vested in a court of appeals, which shall be established by statute.

(2) Jurisdiction. The jurisdiction of the court of appeals shall be as provided by statute or by rules authorized by statute.

(3) Review of superior court. Superior court actions may be reviewed by the court of appeals or by the supreme court as provided by statute or by rule authorized by statute.

(4) Judges. The number, manner of election, compensation, terms of office, removal and retirement of judges of the court of appeals shall be as provided by statute.

(5) Administration and procedure. The administration and procedures of the court of appeals shall be as provided by rules issued by the supreme court.

(6) Conflicts. The provisions of this section shall supersede any conflicting provisions in prior sections of this article."

II. Statutes

"Revised Code of Washington 2.04.010 Jurisdiction. The supreme court shall have original jurisdiction in habeas corpus and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or before the supreme court, or before any superior court of the state, or any judge thereof."

"Revised Code of Washington 2.06.010 Court of appeals established — Definitions

There is hereby established a court of appeals as a court of record. For the purpose of RCW 2.06.010 through 2.06.100 the following terms shall have the following meanings:

(1) "Rules" means rule of the supreme court.

(2) "Chief justice" means chief justice of the supreme court.

(3) "Court" means court of appeals.

(4) "Judge" means judge of the court of appeals.

(5) "Division" means a division of the court of appeals.

(6) "District" means a geographic subdivision of a division from which judges of the court of appeals are elected.

(7) "General election" means the biennial election at which members of the house of representatives are elected."

"Revised Code of Washington 2.06.020 Divisions — Locations — Judges enumerated — Districts

The court shall have three divisions, one of which shall be headquartered in Seattle, one of which shall be headquartered in Spokane, and one of which shall be headquartered in Tacoma:

(1) The first division shall have six judges from three districts, as follows:

(a) District 1 shall consist of King County and shall have four judges;

(b) District 2 shall consist of Snohomish county and shall have one judge; and

(c) District 3 shall consist of Island, San Juan, Skagit and Whatcom counties and shall have one judge.

(2) The second division shall have three judges, one from each of the following districts:

(a) District 1 shall consist of Pierce County

(b) District 2 shall consist of Clallam, Grays Harbor, Jefferson, Kitsap, Mason and Thurston counties.

(c) District 3 shall consist of Clark, Cowlitz, Lewis, Pacific, Skamania and Wahkiakum counties.

(3) The third division shall have three judges, one from each of the following districts:

(a) District 1 shall consist of Ferry, Lincoln, Okanogan, Pend Oreille, Spokane and Stevens counties.

(b) District 2 shall consist of Adams, Asotin, Benton, Columbia, Franklin, Garfield, Grant, Walla Walla and Whitman counties.

(c) District 3 shall consist of Chelan, Douglas, Kittitas, Klickitat and Yakima counties."

"Revised Code of Washington 2.06.030 General power and authority — Transfers of cases — Appellate jurisdiction, exceptions — Appeals

The administration and procedures of the court shall be as provided by rules of the supreme court. The court shall be vested with all power and authority, not inconsistent with said rules, necessary to carry into complete execution all of its judgments, decrees and determinations in all matters within its jurisdiction, according to the rules and principles of the common law and the Constitution and laws of this state.

For the prompt and orderly administration of justice, the supreme court may (1) transfer to the appropriate division of the court for decision a case or appeal pending before the supreme court; or (2) transfer to the supreme court for decision a case or appeal pending in a division of the court.

Subject to the provisions of this section, the court shall have exclusive appellate jurisdiction in all cases except:

(a) cases of quo warranto, prohibition, injunction or mandamus directed to state officials;

(b) criminal cases where the death penalty has been decreed;

(c) cases where the validity of all or any portion of a statute, ordinance, tax, impost, assessment or toll is drawn into question on the grounds of repugnancy to the Constitution of the United States or of the state of Washington, or to a statute or treaty of the United States, and the superior court has held against its validity;

(d) cases involving fundamental and urgent issues of broad public import requiring prompt and ultimate determination; and

(e) cases involving substantive issues on which there is a direct conflict among prevailing decisions of panels of the court or between decisions of the supreme court;

all of which shall be appealed directly to the supreme court: *Provided*, That whenever a majority of the court before which an appeal is pending, but before a hearing thereon, is in doubt as to whether such appeal is within the categories set forth in subsection (d) or (e) of this section, the cause shall be certified to the supreme court for such determination.

When the court acquires jurisdiction of any cause and makes a disposition thereof, there shall be a right of appeal to the supreme court when the court reverses a judgment or order of the superior court by less than a unanimous decision. In all other cases, appeals from the court to the supreme court shall be only at the discretion of the supreme court upon the filing of a petition for review. No case, appeal or petition for a writ filed in the supreme court or the court shall be dismissed for the reason that it was not filed in the proper court, but it shall be transferred to the proper court."

"Revised Code of Washington 2.06.040 Panels — Decisions, publication as opinions, when — Sessions, where held — Rules

The court shall sit in panels of three judges and decisions shall be rendered by not less than a majority of the panel. In the determination of causes all decisions of the court shall be given in writing and the grounds of the decision shall be stated. All decisions of the court having precedential value shall be published as opinions of the court. Each panel shall determine whether a decision of the court has sufficient precedential value to be published as an opinion of the court. Decisions determined not to have precedential value shall not be published. Panels in the first division shall be comprised of such judges as the chief judge thereof shall from time to time direct. Judges of the respective divisions may sit in other divisions and causes may be transferred between divisions, as directed by written order of the chief justice. The court may hold sessions in such of the following cities as may be designated by rule: Seattle, Everett, Bellingham, Tacoma, Vancouver, Spokane, Yakima, Richland and Walla Walla.

No judge of the court shall be entitled to per diem or mileage for services performed at either his legal residence or the headquarters of the division of the court of which he is a member.

The court may establish rules supplementary to and not to conflict with rules of the supreme court."

III. Rules of Court

"CAROA 1 *Method herein provided exclusive.* The mode provided by these rules for appealing cases to the court of appeals, and for securing a review of the same therein, shall be exclusive."

"CAROA 46 *Appeals in criminal cases.*

(a) . . . . . .

(1) . . .

(2) . . .

(3) . . .

(4) . . .

(b) Notice of Appeal.

(1) Filing. In order for the Court of Appeals to obtain jurisdiction of an appeal in a criminal cause the original and a copy of a written notice of appeal must be filed with the filing fee paid to the clerk of the superior court unless the appellant is authorized to proceed in forma pauperis, within thirty (30) days after entry of the order, judgment, or decree from which the appeal is taken or, in the event of a motion timely made subsequent to judgment which, if granted, would modify or delay the effect of the judgment, within thirty (30) days after entry of an order granting or denying the motion. The clerk of the superior court shall forthwith file the copy of the notice of appeal with the clerk of the division of the Court of Appeals to which the notice of appeal is di-

rected and transmit therewith the filing fee, if any. Failure of the superior court clerk to file the copy with, and forward the filing fee, if any, to the clerk of the Court of Appeals, will not affect the validity of the appeal.

(2) . . . .
(3) . . . .
(c) . . . .
(d) . . . .
(e) . . . .
(f) . . . .
(g) . . . .
(h) . . . ."

"CAROA 50 *Post opinion procedures.*

(a) . . . .

(b) Petition for Review Addressed to the Supreme Court.

(1) Time. Any party to a case in which an opinion has been filed by the court of appeals, may within twenty days after the denial of a petition for rehearing or modification, file in the supreme court a petition for review. A copy of the petition must be filed with the court of appeals and a copy served on the opposing party within the twenty day period. Proof of service of the copy on the opposing party shall be filed in the supreme court with the petition. A petition not filed and served as herein provided will not be considered.

(2) . . .
(3) . . .
(c) . . . .
(d) . . . ."

"ROA I-15 *Jurisdiction.* The supreme court shall acquire jurisdiction of a cause or proceeding when a petition for review is granted, a writ is issued, or upon the filing of a proper notice of appeal to the supreme court. Upon acquiring jurisdiction of a cause, the supreme court shall have control of the superior court and court of appeals and of all inferior officers in all matters pertaining thereto and may enforce such control by a mandate or otherwise and, if necessary, by fine and imprisonment, which imprisonment may be continued until obedience shall be rendered to the mandate of the supreme court. The superior court shall retain jurisdiction for the purpose of all proceedings by these rules provided to be had in such court, for the purpose of settlement and certification of the statement of facts, and for all other purposes as might be directed by order of the supreme court."

STATEMENT OF THE CASE

The petitioner was charged with manslaughter as a result of the accidental death of a friend, Ronald LeRoy Bowers, who was temporarily residing with him. The death occurred on December 7, 1973, at the petitioner's home in Warden, Washington, after the two men had been examining a damaged shotgun, the fatal instrument, for the purpose of determining whether the decedent might wish to purchase the same at a modest price for a hunting or sporting purpose (St. 95 and 96).

The issues of fact at trial centered upon whether the petitioner had been criminally careless in failing to properly examine the gun for a live load and/or his negligent handling of it, with the defense contending and putting on evidence to prove that the shotgun could have discharged by purely accidental means and/or

that the deceden t had caused his own death by loading the weapon during a temporary absence of the petitioner

During the trial and during the presentation of evidence by the defense, the defendant took the stand in his own behalf. Following direct examination during which there was no mention of a possible prior criminal record by the defendant, the prosecutor inquired whether the defendant had ever been convicted of a crime. Objection was made and argument was heard in the absence of the jury; the substance of the objection being that the prosecutor could not inquire of a defendant regarding alleged prior convictions unless the State was prepared to prove such convictions by evidence other than the testimony of the accused that he had indeed been convicted on a former occasion and that he had either had counsel or had properly waived counsel at that time.

It became apparent during the argument upon the objection that the prosecution did not possess any admissible evidence regarding a former conviction (St. 100 through 104). The Court, following some discussion, however, directed the defendant to answer whereupon the defense moved for a mistrial because the prosecution had asked the question in the presence of the jury without possessing the required supporting evidence. The motion was denied, and the defendant was required to answer the inquiries of the prosecutor relative to a former conviction of indecent liberties (St. 104).

The trial evidently presented what the jury considered to be a debatable issue of fact as it deliberated for several hours (St. 147) before returning a verdict of guilty.

The defendant made a timely motion for a new trial (Tr. 67) based, in part at least, substantially upon the objection made at the time of trial regarding inquiry into the admitted prior conviction. Following denial of the motion for new trial (Tr. 74), and entry of judgment and sentence (Tr. 75), the defendant appealed by the prescribed method to the Washington State Court of Appeals, Division III. Following submission of briefs and oral arguments, the Court of Appeals issued an unpublished opinion in which it affirmed the decision of the trial court and the denial of the motion for new trial. A petition for rehearing was denied, and a petition for review filed with the Washington State Supreme Court was subsequently denied the petitioner without appearance or opportunity therefor by counsel for the petitioner or the State.

ARGUMENT

QUESTION I:

Since *Gideon v. Wainwright, Supra; Burgett v. Texas, Supra; United States v. Tucker, Supra;* and *Loper v. Beto, Supra,* the courts in Washington have modified the rule relating to the introduction of evidence of a prior conviction for the purpose of either supporting guilt (impeachment) or enhancement of punishment.

Prior to the advent of the rule evolving from these cases, the State was permitted to inquire into the circumstances of previous convictions almost at will, with no risk of error committed thereby regardless of whether or not an accused had been previously convicted of a crime.

With recent changes in the rule, a certain confused form of the rule has begun to emerge to bring it within

the guidelines of the United States Supreme Court decisions, elements of which are apparent but which have led to a rather grotesque interpretation of it.

From a synthesis of some of the more salient cases, it would appear that the rule could be stated as follows:

> ". . . the use of prior convictions for the purpose of impeachment or enhancement of punishment shall not be allowed unless it shall appear upon the record that the defendant was afforded counsel at the prior hearing or, in fact, made a valid waiver of counsel." *State v. Paul*, 8 Wn. App. 666, 667, 508 P. 2d 1033.
> ". . . proof of prior convictions through cross-examination is specifically authorized by RCW 10.52.030. Moreover, no prejudice occurs where the defendant actually acknowledges the conviction from the witness stand. *State v. Beard*, 74 Wn. 2d 335, 444 P. 2d 651 (1968) (dictum). It is only when the prosecutor is unable or unwilling to substantiate his accusations in the face of defendant's sworn denial that error is committed. . " *State v. Martz*, 8 Wn. App. 192, 504 P. 2d 1174. See also *State v. Kimbriel*, 8 Wn. App. 859, 864, 510 P. 2d 255.

The court in *State v. Martz, supra*, elaborated on the meaning of the last statement, and the explanation furnishes one of the prime reasons for the petitioner's questioning of the rule:

> ". . . Unquestionably, in this case the prosecutor risked reversible error when in the context of a prosecution for rape he inquired regarding prior conviction of assaulting a woman, without having the record of the conviction before him. Defendant's affirmative answer, however, nullified the possibility of prejudice."

In other words, had the defendant denied the conviction in *State v. Martz, supra*, reversible error would have been committed and a motion for a mistrial would have been granted because of the inquiry. The court did not distinguish between a truthful or a false denial of a past conviction and there is no doubt that the result of this perversion of the rule works to the benefit of the accused in either case. This view is supported in the instant case by a statement of the prosecuting attorney made during the argument upon petitioner's objection to the question:

> "MR KLASEN: Under penalty of perjury we will ask the defendant whether or not he had counsel. As I understand the rule, our information is he went to trial November 24, 1971, in Adams County. Our position is he didn't have to have counsel, he was advised of his rights, and I can't conceive at this late date — in 1971 — that he went to trial without being advised of his constitutional rights, so we are prepared on one of two things. We can ask Mr. McCullough and we will have a charge of perjury on Mr. McCullough if he says he didn't have counsel."

It was obvious from the prosecutor's statements and admissions and the efforts of the trial court in attempting to remedy the situation (St. 100 through 104) that the State was unprepared to shoulder the burden of overcoming a denial on the part of the petitioner. Thus, the fact of conviction and whether the petitioner had or had no counsel or waived counsel was not properly the subject of inquiry by the prosecutor. To hold otherwise would be to reward perjury on the part of an untruthful accused because a proper motion for mistrial would immediately lay. On the other hand, in the case of a truthful defendant, such as the petitioner in this case, the rule would amount to an unconscionable trap permitting the prosecutor to "fish" for convictions

to discredit the accused if willing to risk the commission of error and a mistrial depending upon a defendant's past record of convictions, if any, and the resulting answer.

Surely the rule as it evolved in the previously cited cases of the United States Supreme Court was not meant to be utilized in such fashion.

In *State v. Paul, supra,* a 1973 case which depended heavily upon the rationale of *Burgett v. Texas, supra; United States v. Tucker, supra; Loper v. Beto, supra;* and *Gideon v. Wainwright, supra,* the defendant Paul had testified on direct examination regarding prior convictions in the State of Washington and British Columbia, Canada. The prosecutor, on cross-examination, expanded on the defendant's testimony, and elicited information concerning other crimes. The defendant appealed claiming a violation of his constitutional rights as defined in those federal cases. The Court, in upholding Pauls' conviction, impliedly conceded that cross-examination would have been improper under the rule had not the defendant admitted to the prior convictions during direct examination.

> "(2) In the instant case, defendant admitted, during direct examination, prior convictions in British Columbia, Canada, as well as one conviction in this state. The record, with respect to the prior convictions in British Columbia is silent as to whether defendant was afforded counsel or waived counsel. . . . Defendant had a choice to admit these convictions or not during direct examination. . . (citation) . . . He chose to make the admissions. Admittedly, the decisions in *United States v. Tucker, supra,* and *Loper v. Beto, supra,* had not been rendered at the time of this trial. However, *Burgett v Texas, supra,* antedated this trial. Having so testified on

> his direct examination, he cannot now challenge proper cross-examination within the scope of his own testimony. *We find no merit to the alleged constitutional violation in light of defendant's own admission of his prior convictions during direct examination.* . . . (citation)." (Emphasis supplied)

The petitioner in the instant case did not at any time testify to any prior convictions during direct examination. To the contrary, objection was timely made when the subject was broached by the prosecutor. The record discloses (St. 100 through 104) that the State was unprepared to offer any evidence pertaining to a former conviction or any of the surrounding circumstances such as whether or not the defendant had counsel or had waived that right in appropriate fashion. The objection should have been sustained, and because it was originally asked in the presence of the jury without the State being prepared to shoulder the burden required of it, the petitioner's motion for mistrial should have been granted. As a result of the failure of the trial court to do so, and the denial of the petitioner's motion for new trial and the subsequent affirmance by the Court of Appeals, the defendant was denied due process under the Constitution of the United States, Amendment XIV, and the guarantees of the Sixth Amendment thereof as applied in *Burgett v. Texas, supra,* and the other applicable cases previously cited herein.

QUESTION II:

The Supreme Court of the State of Washington has long recognized a litigant's right of appeal under the Washington State Constitution. Art. 4, § 4, Washington State Constitution; *Bishop v. Illman,* 9 Wn. 2d 360, 115 P. 2d 151; *Robison v LaForge,* 170 Wn. 678, 17 P. 2d 843. Article 4, § 4, granted to the Supreme

Court complete appellate jurisdiction in all cases (with the exception of minor civil cases involving values of less than Two Hundred Dollars). With this right of appeal to the state supreme court, the state constitution further provided that all decisions of that court would be published and would be free for publication by any person. Art. 4, § 21, Washington State Constitution.

It was early determined that though the right existed, it was not "self-executing" and legislation was required to endow the right with vitality. *State ex rel Northwestern Elec. Co. vs. Superior Court for Clark County*, 27 Wn. 2d 694, 179 P. 2d 510; *Robison v. LaForge, supra; Western American Co. v. St. Ann Co.*, 22 Wn. 158, 60 P. 158. Such a "breath of life" was furnished by the early passage of RCW 2.04.010, which is basically a reiteration of Article 4, § 4.

In November, 1968, the electorate of the State of Washington passed Amendment 50 (Art. 4, § 30) to the State Constitution. This amendment provided for the creation of a new court entitled the Court of Appeals to be established by statute. This court was to be in addition to the Supreme Court, Superior Courts and Justice Courts previously provided for in Article 4, § 1. The jurisdiction of the Court of Appeals was to be determined by statute or rules so authorized and appeals of superior court actions ". . . may be reviewed by the court of appeals or by the supreme court as provided by statute or by rule authorized by statute. . ." This latter provision (Art. 4, § 30, (3)) did not operate to deprive the Supreme Court of its jurisdiction of appeals in all cases such as the one at bar, or to deprive litigants in the State of Washington of the right to take appeals to that court. Rather, this constitutional provision when considered along with the other provisions of

Amendment 50 merely provides for the creation of another court which "shares" certain powers with the Supreme Court without detracting from that jurisdiction, and a litigant's long standing right to appeal to the State Supreme Court remains though an appeal has been taken to the Court of Appeals, which is, in essence a lesser or intermediate court.

Subsection 6 of Article 4, § 30 (Amendment 50) provides that the provisions of the amendment ". . . shall supersede any conflicting provisions in prior sections of this article." However, in examining Article 4, § 4, side by side with the amendment, a conflict is not discernible. As mentioned, the amendment does not pretend to do anything other than provide for another court not previously included in the constitution. However, the legislature, treating the amendment as though it had superseded Article 4, § 4, enacted RCW 2.06.030 and attempted through that statute to vest "exclusive jurisdiction" in that court in the majority of cases appealed from Superior Court with a discretionary right of review upon petition to the Supreme Court. This, of course, runs counter to the long established right of appeal to the Supreme Court under Article 4, § 4. This is the crux of the petitioner's contention that appeal to the Washington State Supreme Court is a matter of constitutional right and that a denial of that right denies the petitioner of due process under both the state and federal constitutions. In attempting to vest "exclusive appellate jurisdiction" in the Court of Appeals, RCW 2.06.030 runs directly counter to Article 4, § 4, of the constitution thus rendering itself offensive thereto. Being constitutionally repugnant, it fails to fulfill its task in establishing the jurisdiction of the court of appeals or to provide the mode of appeal to that court or the Supreme Court. Thus, the petitioner's right of appeal

could only be exercised by appeal to the Supreme Court of the State of Washington and that right has been denied.

In following the defined appellate procedures in the State of Washington, appeal must first be taken to the Court of Appeals in the appropriate division, CAROA 1 and 46 (b) (1), and following a decision of the Court of Appeals and denial of a petition for rehearing, a petition for review may then be lodged with the Supreme Court (CAROA 50 (b) (1) and ROA I-15). Should the review be accepted the litigant-on-appeal has received his right of appeal under Article 4, § 4. On the other hand, should the review be denied, petitioner submits that the right has then been denied. It is at this juncture that the first opportunity arises by which the question may be raised as to the denial of the right of appeal to the State Supreme Court. Unfortunately there is no procedural mechanism at this point to raise the question before the supreme court. Petitioner is unaware of any procedure under the rules whereby a petition for rehearing or reconsideration is allowed from a denial of a petition for review. The denial without right of challenge is automatically returned to the Court of Appeals for finalization of judgment. The only remedy perceived by the petitioner is by seeking relief by way of Writ of Certiorari to the United States Supreme Court.

The petitioner has also been denied due process and equal protection of the law by the denial of appeal by RCW 2.06.030 and the arbitrary and unreasonable classification authorized by RCW 2.06.040 which permits the Court of Appeals to deprive a party before that court of the protective benefits of a published opinion based upon the vague and indefinite standard of "precedential value".

Indeed, it could certainly be argued that with the obvious modification or changes in the rule concerning inquiry into former convictions in the State of Washington, that any case bearing on that subject might well be said to have precedential value. Further, given the facts and ruling in *State v. Paul, supra*, it would only seem logical that the instant case would furnish opportunity to establish "precedent" in that it was a natural successor to the *Paul* case and its ruling where the petitioner had not testified on direct examination but had raised the same constitutional question. However, the Court of Appeals, by virtue of the authority of RCW 2.06.040 determined that the case did not have "precedential value" and thus not to be published. It is this the petitioner contends that deprives him and a great number of litigants similarly situated from the protections afforded by appeal to the State Supreme Court and the consequent publication of all opinions thereof as required under Article 4, § 21, of the Washington State Constitution, since each published opinion must be deemed to have precedential value as determined by any member of the public examining the opinion and forming that conclusion. RCW 2.06.040 is a departure from the traditional use of opinions in the decisional process in that it prevents members of the public from examining all of its decisions and making the crucial decision as to which opinion of the appellate court best supports or conforms with the theory of that person as a party. Thus, not only has the petitioner and many others been subjected to decisions not open to public scrutiny, but the Court of Appeals has presumed by virtue of RCW 2.06.040 to determine for the public which decisions may have value to any particular member of that body under all circumstances.

The classification authorized by RCW 2.06.040 ac-

tually permits the Court of Appeals to decide this case and others without regard for *stare decisis*. Under the holding in *State v. Fitzpatrick*, 5 Wn. App. 661, 491 P. 2d 262, such unpublished cases do not become a part of the common law of the State in that they are uncitable in any trial or appellate court. This results in the removal of the case from the body of the law of the State, a creature *sui generis* so to speak with no meaning to anyone other than the immediate circle of litigants cut off and insulated from the normal processes of the common law.

WHEREFORE, petitioner respectfully requests a hearing in this court.

C. E. HORMEL
Counsel for Petitioner
225 Basin Street S.W.
Ephrata, Washington 98823
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APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF GRANT

STATE OF WASHINGTON, *Plaintiff*, *vs.* WILLIAM McCULLOUGH, *Defendant.*	No. 3633 ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

THIS MATTER having come on for hearing before the above-entitled court this date, and the State of Washington being represented by Paul Klasen, Grant County Prosecuting Attorney, and the defendant WILLIAM McCULLOUGH represented by his attorney, C. E. Hormel, and the arguments on the defendant's motion for a new trial having been heard and the court being fully advised in the premises, now, therefore

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant's motion for a new trial be and the same is hereby denied.

DONE IN OPEN COURT this 15th day of March, 1974.

B. J. McLean
Judge

Presented by:

PAUL KLASEN
Prosecuting Attorney

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
WILLIAM MCCULLOUGH,
Appellant.

No. 1227-III

Division Three
Filed Jun 17 1975

MUNSON, J. — Defendant appeals from a conviction of manslaughter. The homicide occurred at the apartment of the defendant during the early morning hours of December 7, 1973. The defendant had in the apartment a 12-gauge shotgun which he owned and had shown Ronald Leroy Bowers, the decedent, who had been interested in purchasing it. Defendant testified that at no time was the gun ever loaded in his presence, and that he had maintained the gun in an unloaded state at all times; that during a period when the defendant was absent from the room where Bowers and the shotgun were located, Bowers loaded the gun and upon the defendant's return to the room, the defendant picked up the gun, which accidentally discharged, striking Bowers in the chest.

First, defendant contends the court erred in denying the defendant's motion for a new trial because the state's expert witness testified, on direct, and in rebuttal, to a broader range of matters than disclosed to the defense. It is defendant's contention that the extended testimony of the expert violated the restrictive provisions of CrR 4.7[1], as well as the restrictions of the omnibus order of February 1, 1974. We disagree.

[1]CrR 4.7 — rule relating to "Discovery" — provides for matters subject to discovery by both the prosecutor and the defendant.

The record does not disclose what statements, if any, the prosecutor provided to defense counsel pursuant to CrR 4.7. Additionally, there is no record as to what the state's expert was allegedly permitted to, or restricted from testifying to, pursuant to the omnibus hearing. Thus, we are unable to conclude that the testimony exceeded the claimed restrictions placed thereon by either the omnibus hearing pursuant to CrR 4.5 or the provisions of CrR 4.7. In the absence of such a restriction, an expert may be permitted to testify as to any matter within his expertise. *Myers v Harter*, 76 Wn. 2d 772, 781, 459 P. 2d 25 (1969).

Secondly, defendant contends it was error to permit the testimony of the state's expert witness in rebuttal. The admission of rebuttal testimony is a matter within the sound discretion of the trial court. *State v. White*, 74 Wn. 2d 386, 444 P. 2d 661 (1968). The defendant having placed in issue the alleged defective condition of the gun, we cannot conclude an abuse of discretion resulted when the state was permitted to rebut such testimony through its own expert.

Thirdly, defendant contends it was error for the trial court to have permitted the state to cross-examine the defendant in regard to a prior conviction, which was not revealed during direction examination, when the state was not prepared to prove the conviction by documented evidence. *State v. Beard*, 74 Wn. 2d 335, 338, 444 P. 2d 651 (1968). The prosecutor must be prepared to prove the prior conviction and that the defendant was assisted by counsel or waived counsel in the event of defendant's denial of the conviction. *State v. Kimbriel*, 8 Wn. App. 859, 510 P. 2d 255 (1973); *State v. Paul*, 8 Wn. App. 666, 508 P. 2d 1033 (1973). However, the inability to prove the conviction is not fatal where, as here, the defendant admitted, both in the ab-

sence of the jury and again in its presence, to having been convicted while represented by counsel. *State v. Martz*, 8 Wn. App. 192, 504 P. 2d 1174 (1973). This result should not be interpreted as an endorsement of the obvious laxity of the State in not having, in hand, the necessary documentation to prove the conviction in the event the defendant should deny it.

Lastly, defendant contends that a prima facie case of manslaughter was not presented, thereby precluding submission of the case to the jury. We disagree. In *State v. Woods*, 5 Wn. App. 399, 487 P. 2d 624 (1971), the court stated:

> When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences must be drawn in favor of the state and the evidence interpreted most strongly against the defendant. *State v. Woody*, 73 Wn. 2d 179, 437 P. 2d 167 (1968). If there is substantial evidence tending to establish circumstances from which the jury could logically and reasonably conclude the state sustained its burden of proof, we cannot inquire further. "Where there is any evidence, however slight, and the evidence is conflicting or is such that reasonable minds may draw different conclusions therefrom, the question is for the jury." *State v. Pristell*, 3 Wn. App. 962, 964, 478 P. 2d 743 (1970).

Admittedly, the defendant shot Bowers. The question remained whether the homicide was committed in a negligent manner. The evidence was conflicting as to whether the gun was maintained in a loaded or unloaded condition and the cause of the discharge of the gun; questions of fact were properly reserved for the jury. A prima facie case of manslaughter was presented.

Pursuant to RCW 2.06.040, as amended by Laws of 1971, ch. 41, § 1, p. 63, this opinion will not be published.

Judgment affirmed.

MUNSON, J.

WE CONCUR:

McINTURFF, C.J.
GREEN, J.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF GRANT

STATE OF WASHINGTON, *Plaintiff*, vs. WILLIAM NEAL McCULLOUGH, *Defendant*. — No. 3633 — JUDGMENT AND SENTENCE (On Jury Verdict)

THIS MATTER coming on regularly for hearing in open court on the 28th day of June, 1974, the defendant WILLIAM NEAL McCULLOUGH appearing and being represented by his attorney C. E. Hormel, and the State of Washington appearing by Paul Klasen, Prosecuting Attorney for Grant County, and the defendant having been found guilty by a duly impaneled jury on the 6th day of March, 1974 of the following crime as alleged in the Superior Court Information, towit: MANSLAUGHTER, RCW 9.48.060. Whereupon the defendant being asked if there were any

causes that Judgment and Sentence should not be pronounced and no sufficient cause being shown, and the Court and the defendant being fully advised in the premises, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said defendant is guilty of the crime of MANSLAUGHTER, RCW 9.48.060 as charged in the Superior Court Information herein and that he be punished by confinement in the Washington State Correctional Center for a term of not more than twenty (20) years for classification, confinement and placement in such correctional facility under the supervision of the Department of Social and Health Services, Division of Institutions as the Assistant Secretary of the Division of Institutions shall deem appropriate, pursuant to RCW 72.13.120. The said defendant is now hereby committed to the custody of the sheriff of aforesaid County to be detained and by him delivered into the custody of the proper officers for transportation to, and confinement in, said institution.

Signed this 28th day of June, 1974 in the presence of said defendant.

B. J. McLean
Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, *Respondent,* v. WILLIAM NEAL MCCULLOUGH, *Appellant.*	No. 1227-III Division Three ORDER DENYING PETITION FOR REHEARING

The Court has considered the petition for rehearing.

That Petition is denied.

DATED: August 7, 1975.

J. BEN McINTURFF
Chief Judge

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, *Respondent,* vs. WILLIAM NEAL MCCULLOUGH, *Petitioner.*	No. 43903 (1227-III) ORDER DENYING PETITION FOR REVIEW

The Court having considered the petition for review of the decision of the Court of Appeals in this cause,

It is ordered that the petition be and it is hereby denied.

Dated this 7th day of October, 1975.

By the Court:

C. F. STAFFORD
Chief Justice

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, *Respondent*, v. WILLIAM NEAL McCULLOUGH, *Appellant*.	REMITTITUR No. 1227-III Grant County No. 3633 Order denying Petition for Review Entered 10-7-75

The State of Washington to:
The Superior Court of the State of Washington
in and for Grant County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division III, filed on June 17, 1975, became the final judgment of this court in the above entitled case on October 7, 1975. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

cc: C. E. Hormel
Hon. Paul Klasen
Hon. William M. Lowry
Reporter of Decisions
Charles Morris, Secretary of Dept. of Social & Health
Wash. State Board of Prison Terms & Paroles

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Spokane, this 9th day of October, A.D. 1975.

DAVID A. MacCULLOCH
Clerk of the Court of Appeals,
State of Washington, Division III.